

1411824 (Migration) [2015] AATA 3216 (23 July 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Tuong Ngoc Vo

VISA APPLICANT: Ms Nguyen Phuong Nhi Pham

CASE NUMBER: 1411824

DIBP REFERENCE(S): OSF2013/027450

MEMBER: Margie Bourke

DATE: 23 July 2015

PLACE OF DECISION: Melbourne

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DECISION: The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 23 July 2015 at 1:00pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 May 2014 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 9 October 2013 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211 and cl.309.221.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 because the delegate was not satisfied that the review applicant and the visa applicant were in a spousal relationship at the time of application or at the time of decision.
4. The review applicant appeared before the Tribunal on 14 July 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant via telephone. The hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The review applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the review applicant and the visa applicant were in a spousal relationship within the meaning of s.5F at the time of application and if so, whether they were also in a spousal relationship at the time of decision.

SPOUSE/DE FACTO (cl.309.211(2), cl.309.221)

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the review applicant's certificate of Australian citizenship which was granted in 1983, and his Australian passport issued in 2009, the Tribunal is satisfied the review applicant is an Australian citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all

others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. Based on the marriage certificate which records that the parties were married in Vietnam on 5 September 2013, the Tribunal is satisfied that the review applicant and the visa applicant were married in Ho Chi Minh City Vietnam on 5 September 2013 to and the marriage certificate was certified on 17 September 2013. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. The Tribunal has considered the consistent evidence of the review applicant and the visa applicant. The Tribunal accepts that the review applicant was previously married in 1979 and has four children from that marital relationship. The Tribunal has considered the review applicant's evidence that he separated from his wife in 2007, was divorced from his first wife in 2010 but lived separately but under the same roof with his first wife until July 2013. The Tribunal has considered the evidence of the review applicant that he remained living under the same roof with his first wife as he did not want to upset his youngest daughter who was born in 1991. The Tribunal considered the evidence of the review applicant who stated that his youngest daughter turned 18 in 2009 but even when she was an adult he did not wish to upset her by stating that he was separated or divorced from her mother. The review applicant stated that at the time of the hearing, he had not advised his first wife or any of his children that he was married or planning to bring his second wife to Australia.
12. The Tribunal accepts the visa applicant had been previously married in 2005. The Tribunal has considered the evidence of the visa applicant that she has been separated for six years. The Tribunal has considered the evidence of the visa applicant that she has continued to live in the house of her first husband and his family for the benefit of her daughter who was born in 2006. The visa applicant also stated to the tribunal that she lived separately but under the same roof as her first husband. The visa applicant stated that she did this because she wanted her daughter to be more grown up prior to her parents living in separate homes. The visa applicant stated that at the time of application her daughter was seven years old. The visa applicant stated she petitioned for divorce from her first husband in March 2013, and moved out of her husband's family's home in April 2013. The visa applicant stated that she agreed to her first husband having custody of the child and keeping all their assets when she moved out of the home. She stated she did this because her husband wanted to raise the child and he was too old to have any more children. She stated his two sisters also take care of her child. The visa applicant stated she visits her daughter once a week, to assist with her schoolwork and play with her.
13. The review applicant and the visa applicant stated that they were introduced by the visa applicant's aunt, initially by telephone and then the visa applicant met the review applicant at the airport when he travelled to Vietnam to meet her. The review applicant told the Tribunal that at the time he met the visa applicant he had been living with his first wife, and pretending to his children who resided in the home that their relationship was an amicable and real marriage. The visa applicant told the Tribunal that at the time she met the review applicant at the airport she was living with her husband in his family's home for the sake of

her daughter as she did not think it was appropriate at that time that the child only have one parent due to her age. The review applicant's representative submitted that the parties "fell in love" and this changed the course of their lives and changed the plan they had made in relation to their respective families.

14. The Tribunal accepts the chronological statement that the parties met at the airport in February 2013, there was an agreement to marry in May, a simple engagement ceremony was conducted in June and the review applicant returned to Vietnam in August and the parties married in September in 2013 prior to the application being lodged in October 2013.
15. The Tribunal has considered the evidence that has been provided both to the Department and the additional evidence provided to it prior to the hearing. The Tribunal has considered the receipt for a pair of earrings from June 2013. The Tribunal has noted the parties have provided some Sim telephone cards but puts little weight on these as evidence of ongoing communication at the time of application as they are undated and do not record numbers, dates or length of calls. The Tribunal has considered the documentary evidence, and accepts that at the time of application the review applicant had been in Vietnam from 22 February 2013 to 15 July 2013, and from 10 August 2013 to 17 September 2013 (excluding a trip to Thailand from 28 August 2013 to 2 September 2013). The Tribunal is satisfied that the visa applicant had obtained temporary household registration at her address for the review applicant to reside there for periods in mid 2013. The review applicant and the visa applicant both stated to the Tribunal that at the time of application the review applicant had spent about 2 to 2 ½ weeks at the visa applicant's family home over his two visits. The Tribunal accepts the review applicant had sent the visa applicant a total of \$4000 at the time of application.
16. The Tribunal has considered the nature of the household at the time of application, and notes that the parties reside in different countries. The Tribunal has considered the evidence of the review applicant and the visa applicant that the parties travelled together. The Tribunal has considered the evidence of the review applicant and the visa applicant that the review applicant spent about a week at the visa applicant's home in his first trip, and about a week to 10 days in his second visit. The Tribunal has considered the temporary household registration for the review applicant to stay at the visa applicant's family home. The Tribunal has considered the evidence that the parties travelled together.
17. The Tribunal has considered the financial aspects of the relationship, including that the review applicant had sent the visa applicant financial support in the amount up to \$4000, that he had given her a gift of jewellery in June 2013 and that the oral evidence of the parties showed a general understanding of each other's financial position.
18. The Tribunal has considered that the parties gave consistent evidence of their knowledge of each other's families and the relatives they had met. The Tribunal has considered the photo albums provided. The Tribunal notes that it was not assisted by any written or oral evidence from an independent person, relative or witness as to the social aspects of the parties' relationship.
19. The Tribunal has considered the written statements of the review applicant and the visa applicant, and the oral evidence of the review applicant and the visa applicant given at the hearing. The Tribunal has considered the evidence of both the visa applicant and the review applicant, in particular in relation to their previous marital relationships. The Tribunal does not accept the evidence of the visa applicant that she has willingly agreed that her first husband has custody of her young daughter and that she has agreed that it was appropriate that her first husband have the child due to his age and inability to have more children. Tribunal has given weight to the fact that neither the review applicant nor the visa applicant told the Tribunal of their plans to have children in the future. The review applicant told the

Tribunal that the visa applicant was leaving her daughter with her first husband because of the court order, although the Tribunal notes the visa applicant stated this was an order made with her consent. The visa applicant told the Tribunal that her daughter would be fine with one parent because she has two aunts, although she also told the Tribunal that she stayed living under the same roof with her first husband for six years because she did not think her child should only have one parent even though the child's aunts lived in that same house. The review applicant stated that the visa applicant's first husband would return custody of the child to her when the child is 18. The Tribunal is not satisfied the visa applicant has separated from her first husband and the child, or intends to stay separated on a long term basis.

20. The Tribunal has considered the evidence of the review applicant who stated that he stayed with his first wife and lived under the same roof for six years after their separation so as not to upset his children. The Tribunal has considered the evidence of the review applicant who also stated to the Tribunal that he has no intention of telling those children of his current situation or the fact that they now have a stepmother. The review applicant stated that his children have their own life and he doesn't have to tell them anything.
21. The Tribunal has considered all the evidence before it, and notes that there is some evidence of the financial aspects of the relationship, the nature of the household, and social aspects of the relationship. The Tribunal also has considered that the parties spoke of their commitment to their life together in the future, and their plans to work and buy a house. However, the Tribunal has balanced this evidence with the family circumstances of both the review applicant and the visa applicant in the year 2013. The Tribunal puts great weight on the fact that in February 2013 when the review applicant went to Vietnam to meet the visa applicant both parties claimed they were living separately but in the same home as their first spouse and with their child or children. The Tribunal puts great weight on the evidence that in February 2013 the review applicant and the visa applicant both stated that the interests of their child or children was their main priority. The fact that the review applicant went to Vietnam to meet the visa applicant indicates that this was not an impulsive or unplanned meeting between the parties. The review applicant told the Tribunal that he went to meet the visa applicant to see if they were compatible. The evidence does not suggest to the Tribunal that the parties then "fell in love" and so they changed their priorities and their plans for the future. Subsequent to the review applicant and the visa applicant meeting, the visa applicant applies for a divorce, the parties agree to marry and both parties move out of the homes they have shared with their first spouses (whom they both claim to have been separated from for approximately 6 years). The Tribunal is concerned that these occurrences may have been put in place for reasons other than a genuine spousal relationship. The Tribunal does not find it plausible that both the review applicant and the visa applicant, who state they are residing with their spouses and chose to give their children's needs priority, both plan to meet and shortly after make decisions which give their child or children's needs little priority.
22. The Tribunal does not accept that the visa applicant, who states she has remained with her first husband for the sake of her young child, then agrees to leave her young child in the custody of the child's father until she is 18 years old. The Tribunal does not accept that the review applicant, who states that he has remained with his first wife for the sake of his adult daughter so that she does not become upset, then does not disclose that he has remarried and intends to live with his new wife, to that daughter because it is "none of her business". The Tribunal is not satisfied that at the time of application the visa applicant and the review applicant had a mutual commitment to a shared life with each other as husband and wife to the exclusion of all others. The Tribunal finds that the evidence might suggest that the parties are still committed to their first spouses. The Tribunal is not satisfied that the visa applicant and the review applicant were in a genuine and continuing relationship at the time of application.

23. As the Tribunal is not satisfied that the parties were in a genuine spousal relationship at the time of application it has not considered factors relevant to time of decision.
24. Given these findings the Tribunal is not satisfied that at the time the visa application was made the parties were in a spousal relationship. Therefore the visa applicant does not meet cl.309.211(2).
25. Based on the marriage certificate, the Tribunal is satisfied the parties were married at the time of application, and therefore the visa applicant does not meet the requirement of cl.309.211(3) that she intends to marry the review applicant at the time of application.
26. As the Tribunal is not satisfied that the visa applicant meets the requirements of cl.309.211(2) or (3), the visa applicant does not meet cl.309.211.
27. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

28.

DECISION

29. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).